NO. 82-1066

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY PTASYNSKI, ET AL, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION OF THE STATE OF LOUISIANA TO AFFIRM

Gene W. Lafitte, Counsel of Record
George J. Domas
Deborah Bahn Price
LISKOW & LEWIS
One Shell Square - 50th Floor
New Orleans, LA 70139-5099
Telephone: (504) 581-7979

David B. Kennedy
KENNEDY & CONNOR
P.O. Box 607
Sheridan, WY 82801
Telephone: (307) 672-2491

William H. Mellor, III
Gale A. Norton
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, CO 80203
Telephone: (303) 861-0244

ATTORNEYS FOR THE
STATE OF LOUISIANA

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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The State of Louisiana, an intervening plaintiff below and an appellee herein, respectfully moves the Court pursuant to Rule 16 of the Rules of the Supreme Court of the United States for summary affirmance of the judgment of the United States District Court for the District of Wyoming holding Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 (the "Act") unconstitutional as being in violation of Article I, § 8, cl. 1 of the Constitution of the United States (the "Uniformity Clause"). The decision of the district court is eminently correct and none of the arguments to the contrary advanced by the government in its Jurisdictional Statement are substantial enough to warrant additional argument before this Court.

STATEMENT

The Memorandum Opinion, Judgment, and Amended

Judgment[1] of the district court are set forth as appendices to the government's Jurisdictional Statement, as are the texts of the Uniformity Clause and the Act. Therefore, these attachments will not be reproduced herein.

As is noted in the Jurisdictional Statement, the plaintiffs below, appellees herein, include a number of independent domestic oil producers and/or royalty owners seeking a refund of windfall profit taxes paid by them under the Act and as to which administrative refund claims were filed. These individual taxpayer plaintiffs additionally prayed for a declaratory judgment that the Act is unconstitutional and an injunction against further assessment and collection of taxes under the Act. Thirty national, regional and state associations representing a broad spectrum of the oil industry joined with the individual taxpayer plaintiffs in bringing the action; however, by order dated August 26, 1981, the district court granted the government's motion to dismiss as to the associations but allowed them to remain parties to the action as permissive intervenors. By order dated July 2, 1981, the district court allowed the States of Louisiana and Texas to file their respective complaints in intervention seeking a declaration that the Act is unconstitutional and an injunction against further assessment and collection of the taxes imposed by the Act.

After successfully defeating the government's motion to dismiss, the individual taxpayer plaintiffs filed a motion for summary judgment, which was joined in by the association plaintiff-intervenors. The State of Louisiana likewise filed a motion for summary judgment, as did the State of Texas,[2] and the government filed a cross motion

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[1] Although the government refers to two amended judgments, dated November 12 and November 15, 1982, respectively, only the amended judgment of November 15, 1982 was filed of record in the district court.

[2] Although the complaints in intervention filed by both Texas and Louisiana challenged the Act under the Tenth Amendment to the United

for summary judgment. For the reasons stated in its Memorandum Opinion dated November 4, 1982, the district court found that the Act violates the Uniformity Clause, and by amended judgment entered November 15, 1982, the court specifically held the Act unconstitutional and ordered that summary judgment be entered in accordance with the Memorandum Opinion.

As the government points out in its Jurisdictional Statement, the dollar amounts at stake in this action are of enormous magnitude. This is particularly true for the individual taxpayer plaintiffs and the thousands of other taxpayers who, by reason of the district court's stay of further proceedings in the case pending appeal, must continue to pay a tax which is clearly unconstitutional and which has already been judicially declared to be unconstitutional. Nevertheless, despite the substantial impact of the decision in this case, the issues involved are straightforward and relatively simple. As will be shown below, there is no question but that the district court's judgment is correct.

ARGUMENT

I. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE ACT VIOLATES THE UNIFORMITY CLAUSE.

(Footnote 2 continued)
States Constitution as well as under the Uniformity Clause, their respective motions for summary judgment encompassed only their claims under the Uniformity Clause. The Tenth Amendment issue is not presently before the Court.

Article I, § 8, cl. 1 of the Constitution of the United States provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but *all Duties, Imposts and Excises shall be uniform throughout the United States.*

(Emphasis added.)

The Act itself characterizes the tax imposed as an excise, *see* 26 U.S.C. § 4986(a), and the government concurs in this characterization. Jurisdictional Statement, at 14-15 n.22. There is no contention by the government that the district court erred in holding that the tax is governed by and must comply with the constitutional limitation contained in the Uniformity Clause.

Nor does the government take issue with the district court's conclusion, based on the jurisprudence, that the uniformity required by the Constitution is strictly geographic uniformity. *Id.* at 14. The district court held that the Act on its face violates this requirement because of the existence of the Alaskan exemption. This holding is clearly correct. By its terms, the Act applies to "taxable crude oil," which is defined as "all domestic crude oil other than exempt oil." *See* 26 U.S.C. §§ 4986(a), 4991(a). "Exempt oil" is defined to include "exempt Alaskan oil," which in turn is defined as:

> [A]ny crude oil (other than Sadlerochit oil) which is produced—
>
> > (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
> >
> > (2) from a well located on the northerly side

> of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

26 U.S.C. §§ 4991(b), 4994(e).

When geographic location determines whether or to what extent a subject will be taxed, it is apparent that the tax is not geographically uniform. And despite its attempt to characterize the Alaskan exemption as a classification which merely takes geographical considerations into account, the government concedes, as it must, that the exemption is "geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska." Jurisdictional Statement, at 17. *See also id.* at 18 (the exemption is defined in terms of the geographic location of the oil); *id.* at 20 (Congress chose to define the scope of the exemption in terms of geographic location).

The only contention advanced by the government in seeking to overturn the the district court's holding is the novel contention that, despite a lack of geographic uniformity, the Act can withstand constitutional scrutiny because it represents an attempt by "substantial congressional majorities" to accommodate "special circumstances" purportedly confined to a limited geographical area. Jurisdictional Statement, at 14. Nevertheless, the adoption of such a contention is repelled by the literal terms and spirit of the Uniformity Clause, as well as by jurisprudence construing the clause spanning almost 200 years.

Despite the absolute language of the Uniformity Clause, the government argues that it was really only intended to prohibit non-uniformity where a geographical distinction results from "combinations" other than of "substantial congressional majorities," and where the distinction strikes at the "vital interests" of one region as opposed to accommodating "special circumstances confined to a limited geographical area." Jurisdictional Statement, at 14. In support of its limited view of the purpose of

the Uniformity Clause, the government quotes the following explanation by Justice Story:

> The answer to the ***[uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist.

Jurisdictional Statement, at 14, quoting J. Story, *Commentaries on the Constitution of the United States* § 957, at 673 (2d ed. 1851).

The State of Louisiana concurs that Justice Story's view of the purpose of the clause is the proper one; however, the quotation does nothing to support the government's argument. Justice Story points out that the purpose of the clause was to prohibit *all* undue preferences of *one* state over another, not merely those imposed by "combinations" or those that would strike at the "vital interests" of a particular region. Justice Story also points out that this purpose was to be accomplished, and "the grossest and most oppressive inequalities" avoided, by requiring that indirect taxes be uniform throughout the United States. There are no qualifications on this requirement.

Not surprisingly, the government does not cite any jurisprudential authority for its novel construction of the purpose of the Uniformity Clause. The government merely asserts that the role of judicial review would not "be at its zenith" were the Court to restrain Congress "from discriminating against 49 states in favor of one." Jurisdictional Statement, at 14. Nevertheless, after an exhaustive review of the history of the Uniformity Clause, the Supreme Court concluded in *Knowlton v. Moore,* 178 U.S.

41, 20 S.Ct. 747, 766 (1900), that this is exactly what the Uniformity Clause was intended to prohibit.

The *Knowlton* Court pointed out that in discussions regarding the need to create a federal government which would have the necessary taxing power,

> the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective states; in other words, the discrimination as regards states which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state.

20 S.Ct. at 769. The Court concluded that "the possible discrimination against one or more states was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, impost taxes, and excises." *Id.* at 766. Thus, the geographical limitation on duties, imposts and excises was construed as having the same purpose as the requirement that direct taxes be apportioned—"the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden." *Id.*

The purpose of the Uniformity Clause was again examined in *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 783 (1901), where the Court stated:

> In determining the meaning of the words of article 1, section 8, "uniform throughout the United States," we are bound to consider, not only the provisions forbidding preference being given to the ports of one state over those of another..., but the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports

> or exports, nor any duty on tonnage. *The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some states and not equally upon others.*

(Emphasis added.) *See Hylton v. United States,* 3 U.S. (Dall.) 171, 179 (1796) (articles taxed in one state should be taxed in another; in this way the spirit of jealously is appeased, and tranquility preserved).

Based on the literal terms of the Uniformity Clause and the commentary and jurisprudence discussing the purpose of the clause, there is no question but that it was intended to prohibit all discriminatory tax burdens, not merely those imposed by a majority of states upon a minority. Just as clearly, the purpose of the clause is violated by the Act's admitted geographical discrimination, notwithstanding the government's assertion that the discrimination is "against 49 states in favor of one."[3]

More importantly, however, the geographical distinction contained in the Act violates the Uniformity Clause regardless of the discrimination which admittedly results from that distinction. As this Court recognized in *Knowlton v. Moore,* the purpose of the clause—to prevent the *possible* discrimination against one or more states which *might* arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state—was accomplished by the *absolute* require-

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[3] Whether the government's assertion concerning the nature of the discrimination is correct is questionable. The legislative history cited by the government (Jurisdictional Statement, at 11-13) demonstrates that the Alaskan exemption was crucial to the imposition of the tax on "newly discovered oil," and hence, to the passage of the Act. Because most of the tax would be paid on crude oil produced in the major producing states such as Louisiana and Texas, a "majority" could have granted an exemption to Alaskan crude oil to insure that the tax would be paid on crude oil produced in a "minority" of states.

ment that indirect taxes be uniform. 20 S.Ct. at 772. In holding that the uniformity required is strictly geographical uniformity the Court laid down the rule "that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that *wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.*" *Id.* at 764. (emphasis added).[4]

Despite its recognition that the Constitution requires geographic uniformity, the government argues that Congress should be free to disregard the requirement with impunity whenever it is justified in doing so by the need to accommodate particular conditions purportedly confined to one geographic area. The argument that particular local conditions might justify deviation from the principle of geographic uniformity, however, is not new. That a geographically uniform impost or excise might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective states was urged repeatedly in the Continental Congress as a reason why the requirement that duties, imposts and excises be uniform throughout the United States should not be adopted. *See generally Knowlton v. Moore,* 20 S.Ct. at 778. These arguments were rejected. In adopting the Uniformity Clause, a conscious decision was made to require geographic uniformity, despite full recognition that a geographically uniform impost, duty or excise might operate unequally due to particular local conditions, and thus be intrinsically non-uniform.

[4] Thus, it is apparent that it is non-uniformity not discrimination, much less "oppressive discrimination," that is proscribed by the clause. In an analogous case, this Court held that the uniformity requirement for bankruptcy laws "is not an Equal Protection Clause for bankrupts." *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 102 S.Ct. 1169, 1177 n.11 (1982). In this case as well, the issue is not whether Congress has discriminated but whether the law in question is uniform.

This Court as well has recognized that many geographically uniform taxes will of necessity be intrinsically non-uniform. Nevertheless, the Court consistently and repeatedly has held that intrinsic inequalities are irrelevant so long as indirect taxes are geographically uniform. Thus, in *Knowlton v. Moore,* it was held that a geographically uniform tax on legacies was constitutional regardless of the fact that the rate of taxation depended on a factor which varied with the testamentary and intestacy laws of the various states. Similarly, in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 358 (1911), this Court held that a geographically uniform corporation tax was constitutional even though it may have operated unequally owing to different local conditions.[5]

Interestingly enough, this rule was first adopted in the *Head Money Cases,* 112 U.S. 580, 5 S.Ct. 247 (1884), the decision so heavily relied upon by the government herein. The Court there recognized that a geographically uniform excise might be intrinsically unequal, but adhered to the standard of geographical uniformity, stating:

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[5] *See also* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 694 (1895); Billings v. United States, 232 U.S. 261, 34 S.Ct. 421, 424 (1914); Brushaber v. United Pac. R.R. Co., 240 U.S. 1, 36 S.Ct. 236, 244 (1916); LaBelle Iron Works v. United States, 256 U.S. 377, 41 S.Ct. 528, 532 (1921); Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265, 266 (1927); Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46 (1929); Poe v. Seaborn, 282 U.S. 101, 51 S.Ct. 58, 61 (1930); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 613 (1931); Charles C. Steward Mach. Co. v. Davis, 301 S.Ct. 548, 57 S.Ct. 883 (1937); Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942); Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178 (1945). *Cf.* Patton v. Brady, 184 U.S. 608, 22 S.Ct. 493, 498 (1902) ("It is not the province of the judiciary to inquire whether the excise is reasonable in amount or in respect to the property to which it is applied").

> Is the tax on tobacco void because in many of the states no tobacco is raised or manufactured? Is the tax on distilled spirits void because a few states pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provision of the constitution that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all *ports* alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States.

5 S.Ct. at 252 (emphasis in original). Thus, the ultimate question in the Court's view was not, as the government suggests "whether Congress had a reasonable basis for distinguishing between the activity that was taxed in coastal states and the similar activity that was untaxed in inland states." Jurisdictional Statement, at 16. Rather, the ultimate inquiry was whether the tax operated "with the same force and effect in every place where the subject of it [was] found," and since the law in question applied to all ports wherever located, it was held to be geographically uniform and, therefore, constitutional.

To the extent that the government views the *Head Money Cases* as requiring Congress to have a rational basis for distinguishing between different, albeit similar, subjects of taxation, the government has misconstrued the

case. Similarly in error is the government's concession that "classifications that operate only in certain areas might be subject to special scrutiny in light of the purposes of the Uniformity Clause." Jurisdictional Statement, at 15. The above cited authorities are consistent in holding that the *only* requirement imposed by the Constitution is geographical uniformity. If this requirement is satisfied, it is irrelevant that other similar subjects might be treated differently (with or without rational justification) or that the tax might operate differently in different areas due to particular local conditions and thus be intrinsically non-uniform.[6]

Other than the *Head Money Cases*, the only authority relied upon by the government is the statement by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159, 95 S.Ct. 335 (1974), where it was noted that the requirement of Article I, § 8, cl. 4 of the Constitution that laws on the subject of bankruptcies be uniform throughout the United States "does not deny Congress

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[6] There is no serious contention by the government in this case that the subject of the Alaskan exemption is something other than that which is the subject of the tax. The tax is imposed on "taxable crude oil." 26 U.S.C. § 4986(a). "Exempt Alaskan oil" is defined as "any crude oil" produced from certain geographical locations. 26 U.S.C. §§ 4991(b), 4994(e). The Act thus does not distinguish between different subjects but between different geographic locations where the same subject (*i.e.*, crude oil) is produced. The government does seek to distinguish "newly discovered oil," the classification for which the exempt Alaskan oil would qualify if not exempt, from the other classifications of "crude oil" contained in the Act. Thus, the government phrases the issue in terms of whether Congress can constitutionally distinguish between North Slope "newly discovered oil" and other domestic "newly discovered oil." Jurisdictional Statement, at 20 n.28. *See also id.* at 17 ("the question is whether in fashioning the tax, Congress could, on the one hand, favor generally 'newly discovered oil' over 'old oil' and accord the most favorable treatment to 'newly discovered oil' located in certain areas"). Even if this distinction were supportable, it would be immaterial. Regardless of whether the subject of the tax is deemed to be "crude oil" or "newly discovered oil," the same subject existing both in the exempt areas of Alaska and outside the exempt areas is treated differently solely because of its geographic location.

power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." Jurisdictional Statement, at 16. Read in context, however, this statement does not support the government's position that Congress has carte blanche to disregard the requirement of uniformity whenever a lack of uniformity can be justified by differences existing in particular parts of the country. The gorgraphically isolated problem which had prompted the legislation was the pendency of railroad reorganization proceedings. Since the Court specifically found that the reorganization proceedings affected by the statute were the only ones in fact existing in the country throughout the time the statute was in effect, the statute was able to take into account differences existing between different parts of the country without violating the requirement of geographic uniformity. The ultimate holding in the case was based on the Court's finding that the bankruptcy law there in question was in fact geographically uniform throughout the United States, not that any deviation from the requirement of uniformity was justified. Indeed, the Court confirmed that its construction of the bankruptcy clause's uniformity requirement comported with its construction of other "uniform" provisions in the Constitution, specifically citing the *Head Money Cases,* where it was held that a tax is "uniform" within the meaning of Article I, § 8, cl. 1 of the Constitution "when it operates with the same force and effect in every place where the subject of it is found."[7]

[7] Similarly, the government argues that the geographical Alaskan exemption is merely a shorthand method used by Congress to exempt crude oil produced under severe climatic conditions and distant from existing transportation systems and markets. Jurisdictional Statement, at 20. This is not, however, a question of "mere niceties of congressional draftsmanship." *Id.* The Uniformity Clause contains no exceptions for congressional shorthand. In any case, it is extremely doubtful that Congress, as the government contends, could have drafted an exemption based on the "underlying conditions" that would "achieve precisely the same result" as the Alaskan exemption. *Id.*

In light of the universal and unwavering recognition that the Uniformity Clause requires strictly geographic uniformity, it is not surprising that, as the government points out, prior to the decision below, no taxing statute had ever been held invalid on the ground that it violated the clause. Jurisdictional Statement, at 13. Not until passage of the Act held unconstitutional here has Congress dared to disregard the unambiguous limitation on its taxing power that is contained in the Uniformity Clause.[8] Congress does not have the power to ignore the constitutional requirement of geographic uniformity in order to accommodate special circumstances purportedly existing only in a limited geographic area. There is no authority whatsoever to support the government's contention that Congress does have this power. Indeed, all of the authorities are to the contrary. Since the government has failed to raise a substantial question as to the district court's holding that the Act on its face violates the Uniformity Clause, further argument is unnecessary and the judgment of the district court should be summarily affirmed.[9]

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[8] A recent attempt by Congress to enact a non-uniform bankruptcy law was struck down by this Court just last term in *Railway Labor Executive's Association v. Gibbons*. Significantly, the majority opinion did not adopt the view that certain justifications might exist for deviations from the principle of strict geographic uniformity.

[9] In a footnote, the government asserts that because there was no production from the exempt regions of Alaska during the taxable periods for which the individual taxpayer plaintiffs claimed a refund, there is no violation of the Uniformity Clause. Jurisdictional Statement, at 20-21 n.28. Nevertheless, the district court was clearly correct when it rejected this argument, stating: "The contention is that the Act is unconstitutional on its face and thus, actual production in Alaska aside, plaintiffs have been and are being subjected to an invalid tax." Memorandum Opinion, at 6 (reproduced in Jurisdictional Statement, at 5a). That the government's argument fails to raise a substantial question is further illustrated by the fact that the taxable periods for which the individual taxpayer plaintiffs seek a refund has no relevance whatsoever to the claims of the States of Louisiana and Texas in their motions for summary judgment that the Act facially violates the Uniformity Clause.

II. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE UNCONSTITUTIONALITY OF THE ACT CANNOT BE CURED BY SEVERING THE ALASKAN EXEMPTION.

After consideration of all of the relevant factors, the district court correctly concluded that the unconstitutionality of the Act could not be cured by severing the Alaskan exemption. The government in its Jurisdictional Statement has not raised any substantial question as to the correctness of this decision.

In this Court, as it did in the district court, the government relies primarily on its contention that the general separability clause contained in the Internal Revenue Code of 1954, 26 U.S.C. § 7852(a), necessitates severance of the Alaskan exemption so as to cure the unconstitutionality of the Act and allow its remaining provisions to continue in effect. This separability clause provides:

> (a) Separability clause.—*If any provision of this title,* or the application thereof to any person or circumstances, *is held invalid, the remainder of the title,* and the application of such provision to other persons or circumstances, *shall not be affected thereby.*

(Emphasis added.)

It is readily apparent from the language of the clause that its intent was to preserve existing provisions of "the title," meaning Title 26, from invalidation. Obviously, it would be extremely unwieldly and undesirable if a constitutional flaw in a later appended tax provision could result in nullification of the entire Code. A correct interpretation of the general separability provision in the Code permits consideration of this Act apart from the remainder of the Code, allowing the Court to sever and nullify the Act

without affecting the remaining provisions of Title 26.

Nevertheless, the district court did not go as far as to hold that the general separability clause of the Internal Revenue Code is wholly inapplicable. Rather, the court merely refused to give the clause as much deferential consideration as the government argued it was due. This decision by the district court is fully supportable, since it has been recognized that where the separability clause relied upon is a general separability clause in a pre-existing statute, its aid in determining legislative intent is very much weakened. As was pointed out in 2 *Sutherland Statutory Construction* § 44.11, at 356 (4th ed. C. Sands 1973) (hereinafter cited as *Sutherland* § __):

> [I]t is a reasonable inference that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of separability than to the clause in a separate act.

In any event, as the government recognized, "the existence of a separability clause is not conclusive as to whether a statute will be held invalid as a whole or invalid only as to those specific provisions that directly offend the limitation imposed by the Constitution." Jurisdictional Statement, at 22. The ultimate question as regards separability is whether the legislature *intended* for the particular portion of the enactment in question to be severable. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936). *See* Jurisdictional Statement, at 22-23. Ultimately, the question is whether the legislature would have enacted the statute without the provision sought to be severed. *Rhode Island Federation of Teachers, AFL-CIO v. Norberg*, 630 F.2d 855, 863 (1st Cir. 1980), (citing *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 52 S.Ct. 559 (1932)). *See generally Sutherland* § 44.04.

After examining the legislative history of the Act,

the district court specifically found that "the Alaskan exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaskan provision." Memorandum Opinion at 11 (reproduced in Jurisdictional Statement, at 9a) (citing H.R. Rep. No. 304, 96 Cong., 2d Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 612-13; S. Rep. No. 394, 96 Cong., 2d Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-446; 125 Cong. Rec. S 18564 (daily ed. Amendment No. 877 as modified), adopted at S 18567 (daily ed. Dec. 14, 1979); 125 Cong. Rec. S 18564, 18566, (daily ed. Dec. 14, 1979); 125 Cong. Rec. S 18565 (daily ed. Dec. 14, 1979)). No substantial question has been raised by the government as to the correctness of this finding.

The government itself recognizes that Congress was concerned "that the general imposition of a windfall profit tax with respect to all 'newly discovered oil' could have a deterrent effect on the future discovery and development of new North Slope oil." Jurisdictional Statement, at 24. Indeed, the government's prior briefs in this case show just how critical this concern was. Because the government's brief in support of its motion for summary judgment in the district court contains an excellent discussion of the importance of the Alaskan exemption in the overall statutory scheme, the section of that brief which discusses the legislative history of the exemption is attached hereto as Appendix A.

Suffice it to reiterate here that "the Act was a result of compromise and very careful balancing of a variety of national interests and problems." App. A, *infra*, A-3. The importance of the Alaskan exemption in this balance because of its role in encouraging the development of this country's petroleum resources is readily apparent from the government's discussion of the legislative history. App. A, *infra*. In the words of the government, "Congress made an exhaustive examination of relevant economic circumstances in the course of determining upon what oil pro-

duction the tax would be levied and to what degree." *Id.* at A-4. There is more than ample support in the legislative history for the government's conclusion that "Congress devoted a great deal of effort and debate to devise a way to make certain that the contemplated excise tax would not act as a disincentive to oil production in Alaska." *Id.* at A-9. Indeed, the government points out:

> The exemption of a portion of Alaskan oil production merely emphasizes the concern of Congress that imposition of the tax on certain Alaskan production would make it less likely that the state's resources would be developed fully.

Id. at A-8. And, as the government's discussion shows, Congress carefully considered alternatives to the Alaskan exemption which would have promoted the Act's purpose by encouraging domestic oil production, but these alternatives were rejected. *Id.* at A-9-12.

In view of the well documented concern of Congress with the need to include incentives in the Act to encourage domestic oil production, and the crucial importance of the Alaskan exemption in obtaining this goal, there is no substantial question as to the correctness of the district court's conclusion that Congress would not have passed the Act absent the exemption.

The only reference to the legislative history of the Act cited by the government in support of its contention that Congress would have enacted the Act as it exists today even without the Alaskan exemption is the statement by Senator Long to the effect that "it is our intention that in the event the courts should find this favorable treatment for Alaska *** should violate the conformity provision in the Constitution, that provision should be regarded as nullity and that Alaska will pay the same 30-percent tax on new oil as everybody else." 126 Cong. Rec. S 3056 (daily ed. March 26, 1980). Although this may have been Senator Long's intent, or even his view of what other unidentified

members of Congress may have intended, it is not necessarily indicative of the intent of the entire Congress. As the district court in this case correctly pointed out:

> The most articulate of individual observations, while providing a certain amount of insight, is not necessarily indicative of the entire Congressional spirit.

Memorandum Opinion, at 10 (reproduced in Jurisdictional statement, at 8a) (citing *American Smelting & Refining Co. v. Occupational Safety & Health Review Commission*, 501 F.2d 504, 509 (8th Cir. 1974)). There was neither debate nor vote on the issue of separability, and no separability clause was included in the Act.

Additionally, while speaking in conclusional terms about intending the Alaskan exemption to be severable, Senator Long virtually admitted that Congress would not be satisfied with the Act if the exemption were severed. He notes that as a result of severance, Alaska would pay the same 30 percent tax as everybody else, but states "if that were to be the case we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from a pipeline or any kind of feasible water transportation." 126 Cong. Rec. S 3056 (daily ed. March 26, 1980).

As was shown above, even the government concedes that the ultimate test for separability is whether Congress would be satisfied with its enactment absent the provision sought to be severed. As the legislative history of the exemption shows, and as Senator Long admits, Congress would not have been satisfied with the Act absent the Alaskan exemption. This being the case, Congress, not the Court, should rewrite the Act in a manner that comports with constitutional requirements.

Indeed, the district court's recognition that severance in this case would amount to "judicial legislation which is not permissible and should be avoided by courts," provides an independently sustainable ground for refusing to cure the unconstitutionality of the Act by severing the Alaskan exemption. Memorandum Opinion, at 12 (reproduced in Jurisdictional Statement, at 10a). The dictum quoted by the government from *Utah Power & Light Company v. Pfost*, 286 U.S. 165, 185 (1932) (Jurisdictional Statement, at 25), notwithstanding,[10] the courts have been particularly reluctant to resort to severance where to do so would result in the extension of a statute by judicial decree. As was stated in *U.T., Inc. v. Brown*, 457 F.Supp. 163, 170 (W.D. N.C. 1978):

> It is a cardinal rule of construction that where an excepting clause or restriction is found unconstitutional the substantive provisions it qualifies cannot stand. (Authorities omitted.) The court will not assume that the legislative body would have enacted the ordinance without the exceptions, nor can the court determine how the substantive provisions of the ordinance might otherwise have been modified had it been known the exceptions would be found unconstitutional.

See generally Sutherland § 44.13, at 359 (and cases cited therein).

Similarly, in *Davis v. Wallace*, 257 U.S. 478, 42 S.Ct. 164 (1922), the plaintiffs argued that North Dakota's special excise tax could not be assessed against them on the basis of the general computation scheme because the excepting provision that governed computation of the tax

[10] Even according precedential value to the dictum in the *Pfost* case, the Act at issue here is not simply a revenue statute, but rather, as the government itself points out, it was the result of a delicate balance between the competing objectives of raising revenue and providing incentives for domestic oil production.

as to them had been declared unconstitutional. This Court agreed, stating:

> Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state; and no other authority is competent to give them a larger application.

42 S.Ct. at 166. *See McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (the severance of a limiting provision almost always alters the meaning and effect of the statute, and for this reason, has been criticized as amounting to "judicial legislation").

This reluctance of the courts to legislate judicially through severance comports with the general rule that courts will avoid substituting their judgment for that of the legislature. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 2292 n.10 (1976); *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc.*, 351 F.2d 925, 929 (9th Cir. 1965), *cert. denied*, 382 U.S. 101 (1966). Thus, in *United States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (2d Cir. 1972), *cert. denied*, 412 U.S. 922 (1973), the court refused to extend the scope of a statute regarding the ranking of federal tax liens, stating:

> [W]here Congress has considered proposals of a highly qualified committee and has enacted specific, carefully-tailored legislation, it would be inappropriate for a court to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit to provide for these extensions.

470 F.2d at 679. The court concluded that the soundest approach was to look to Congress for resolution.

Similarly in this case, the only remedy which will avoid judicial expansion is the one adopted by the district court. In view of the legislative history of the exemption and the purposes sought to be achieved by the detailed balancing in the Act, there is no substantial question but that the district court's decision is correct. That Congress wanted to impose a tax on so-called windfall profits does not alter the fact that it chose this specific act with all of its qualifications and restrictions. While the government alludes to the fiscal consequences of striking the entire tax, these consequences need not be severe if Congress acts quickly to pass a constitutional program. Indeed, by summary affirmance of the district court's decision in this case, the consequences can be minimized even further. On the other hand, failure to develop oil production in Alaska to its full potential—the result Congress wished to avoid—may have long range consequences for the nation's energy supply.

CONCLUSION

The decision of the district court should be summarily affirmed, there being no substantial question as to the correctness of that decision.

Respectfully submitted,

Gene W. Lafitte, Counsel of Record
George J. Domas
Deborah Bahn Price
LISKOW & LEWIS
One Shell Square - 50th Floor
New Orleans, LA 70139-5099
Telephone: (504) 581-7979

David B. Kennedy
KENNEDY & CONNOR

P.O. Box 607
Sheridan, WY 82801
Telephone: (307) 672-2491

William H. Mellor, III
Gale A. Norton
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, CO 80103
Telephone: (303) 861-0244

ATTORNEYS FOR THE
STATE OF LOUISIANA

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NO. C80-0302

JOHN PARTRIDGE, HARRY PTASYNSKI,
BERTON W. AVERY, GOLDIE AVERY,
FREDERICK S. JOHNSON and
CALVIN PETROLEUM,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

STATE OF TEXAS, STATE OF
LOUISIANA, INDEPENDENT
PETROLEUM ASSOCIATION OF
AMERICA, et al.

Intervenors

BRIEF FOR THE DEFENDANT IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

RICHARD A. STACY
United States Attorney

OF COUNSEL:

ROBERT LIVINGSTON

ROBERT L. BAKER
Attorneys
Tax Division
Department of Justice
Washington, D.C. 20530

3. *Legislative History*

As evidenced by the name, the Act was enacted for the purpose of taxing the windfall profits to be realized by oil producers occasioned by the decontrol of oil. "The Crude Oil Windfall Profit Tax Act of 1979 is needed because of the Administration's decision to phase out price controls on crude oil, the recent increases in world oil prices, and the nation's continuing overdependence on imported energy." S. Rep. No. 96-394, 96th Cong., 1st Sess. at 6 (1980-3 Cum. Bull. 131, 142). The Congressional Record is replete with similar references. Thus,

> This windfall profit tax bill imposes a windfall profit tax on domestic oil producers and royalty owners to offset the decontrol of domestic oil prices implemented by the President.

125 Cong. Rec. S18863 (daily ed. Dec. 17, 1979).

> The situation before us is oil. The situation before us is the suddent [sic] enormous increase in profits as a result of the decontrol of oil. The issue before us is the enormous consequences that these huge additional revenues will have for the rest of the United States, for the rest of the country, for those States which are not so fortunate as to be oil producers.

125 Cong. Rec. S18470 (daily ed. Dec. 13, 1979).

A secondary purpose of the Act was to encourage the development of this country's petroleum resources.

> We have attempted to fashion a windfall tax which will promote the exploration, development and production of domestic petroleum resources, while remaining cognizant of the heavy burden imposed on the American people by the rapidly escalating costs of energy. This legislation has

> been shaped under the shadow of our continued dangerous dependence on foreign oil.

125 Cong. Rec. S18863 (daily ed. Dec. 17, 1979).

Needless to say, the Act was a result of compromise and very careful balancing of a variety of national interests and problems.

> While a windfall profits tax would reduce the large revenue gains received by U.S. oil producers, it could also curtail the producers' incentives to explore and produce more oil. Consequently, such a tax should strike the appropriate balance between tax receipts that could be used for public investment or redistribution and industry incentives to increase domestic oil production. By placing relatively high tax rates on oil that would have been produced under controlled prices and relatively low rates on oil that is only marginally profitable at world prices, this balance may be achieved.

125 Cong. Rec. S16864 (daily ed. Nov. 16, 1979).

> It is often said that politics is the art of compromise. Nowhere was that more evident than in the extended negotiations among Senators which took place over the past several weeks. The Finance Committee bill was viewed as a good starting point by many, but substantial increases in the revenues to be raised by the tax were strongly urged by a number of Senators. Others, just as vigorously, opposed any increase in revenues and, in fact, contended that oil production would be stifled by any tax. This bill reflects a balance between those conflicting viewpoints, hammered out in the truest sense of compromise.

125 Cong. Rec. S18863 (daily ed. Dec. 17, 1979).

The Act is a manifestation of Congress' monumental effort and determination to fashion a tax that would, in balance, be as equitable as possible avoiding unfair discrimination against a particular region, and, thereby, achieve "substantial uniformity within the meaning and purpose of the Constitution." *Head Money Cases, supra*, 112 U.S. at 595.

A careful review of the Act and its legislative history reveals that Congress made an exhaustive examination of relevant economic circumstances in the course of determining upon what oil production the tax would be levied and to what degree. For example, Congress considered the impact on big oil companies, independent oil producers and royalty owners, states that produce oil and those that do not, consumers of oil—particularly those located in states not so fortunate as to be oil-producers—overall production of oil and production of different types of oil, *e.g.*, newly discovered oil—

> incremental oil from tertiary recovery techniques (technologies that use heat or chemical compounds to produce additional oil from a reservoir), heavy oil (a highly viscous oil that generally requires additional effort to produce), and the first 1,000 barrels per day of "stripper" oil (oil from wells that have produced 10 or fewer barrels per day for at least a year) produced by independent producers.

125 Cong. Rec. S16864 (daily ed. Nov. 16, 1979). See also 125 Cong. Rec. S17193-S17195 (daily ed. Nov. 26, 1979). S17399, S17422 (daily ed. Nov. 28, 1979), S17715 (daily ed. Dec. 4, 1979), S18054, S18055 (daily ed. Dec. 7, 1979), S18185, (daily ed. Dec. 11, 1979), S18286, S18298 (daily ed. Dec. 12, 1979), S18465, S18470 (daily ed. Dec. 13, 1979).

It must be emphasized that the rationale underlying the treatment accorded the aforementioned special interests and the exempt Alaskan oil in the Act is the same,

i.e., consideration of costs of production, economics, the desire to provide incentives for production, etc. Also, none of the oil produced in Alaska during the period in question is exempt under the Act. In any event a substantial portion of oil produced in Alaska is and will be subject to the windfall profits tax.

Further, it is important to note that the Act exempts oil production in other states as well as a limited amount of Alaskan production, (see Code Sec. 4994(c), Appendix, *infra*, Front-end Tertiary Oil), in order to ensure that the tax "operates with the same force and effect." *Head Money Cases, supra*, 112 U.S. at 594. This is merely a recognition by Congress of the unique circumstances attendant to the exempt production (discussed, *infra*). Failure to provide for such exemptions as Code Section 4994 (c) and (e) would have the force and effect of unfair discrimination against the affected regions as well as discouraging development of these petroleum reserves.

Another prime example of the manner in which Congress accomplished an equitable balancing of a variety of interests is found in a comparison of the exemption accorded particular Alaskan oil production (Code Sec. 4994(e)) and the very favorable treatment given to independent oil producers,[5] *e.g.*, the low tax rates applicable to independents' oil production, Code Section 4992 (26 U.S.C.), and their tax exemption for the production of certain oil. Code Sec. 4994 (c)(1). The enactment of tax legislation containing special benefits for independent oil producers is, taken in isolation, unfair to Alaska. This discrimination occurs because there are no independent oil producers operating in Alaska.

> There are no independents doing business in Alaska. There are no independents in Alaska.

[5] Which was dramatically increased by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, effective August 13, 1981.

> Those are all majors. As a result of the Bentsen amendment, independents were eliminated. So this becomes an anti-Alaska tax.

125 Cong. Rec. S17478 (daily ed. Nov. 29, 1979). There are no independent producers in Alaska because of the extraordinarily high cost of production.

> Let me [Senator Stevens] say again independents are not in my State. They cannot afford to operate in Alaska. They do not have any money left with these advantages the Senator is talking about to finance a well that will cost up to $42 million.

125 Cong. Rec. S17810 (daily ed. Dec. 5, 1979), S18125 (daily ed. Dec. 10, 1979).

However, when the Act is viewed broadly, it is obvious that Congress took into account special factors and circumstances that affect production by independent oil producers just as they did when they considered the extreme conditions peculiar to the production of oil in Alaska. See, *e.g.*, 125 Cong. Rec. S17193-S17195 (daily ed. Nov. 26, 1979) and 125 Cong. Rec. S17728, S17729 (daily ed. Dec. 4, 1979), for discussions regarding independent oil producers. It is likewise clear from the legislative history that Congress considered the production of oil in Alaska as a unique problem to be resolved in a rational manner. Such authority is found throughout the legislative history of the Act, which is replete with references to the distinctive nature of oil production in Alaska.

> Alaskan oil sells at the wellhead for about $8-$9 less than the price of uncontrolled oil in the lower 48 States.
>
> * * * * *
>
> This exemption [for certain Alaskan oil] is intend-

> ed, in part, to eliminate the possibility of creating a disincentive for the production of Alaskan oil, and in apparent recognition of the large disparity between the wellhead price of oil produced north of the Arctic Circle and its actual refinery selling price.

Joint Committee, 96th Cong. 1st Sess. at 21, 22, The Design of a Windfall Profit Tax. Through the course of committee hearings and debates, the problems in developing Alaskan oil were continually reiterated:

> The exemption of Alaskan North Slope oil is based on the economies of Alaskan production.

House Hearings before the Committee on Ways and Means on Windfall Profits Tax and Energy Trust Fund, 96th Cong., 1st Sess. at 18 (1979) (statement by Secretary Blumenthal). See also House Hearings, *supra* at 27.

> It is generally agreed that there is a greater degree of risk in exploration and development in frontier areas, such as the Alaska North Slope than there is in the traditional lower 48 oil exploration. Major factors contributing to these increased risks are severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure.

125 Cong. rec. S16327 (daily ed. Nov. 8, 1979).

> The fact that this oil [Alaskan Cook Inlet] is produced offshore in severe aquatic and climactic conditions, which, considered together with the extra expenses of labor and supplies in Alaska, make this some of the most expensive oil to produce in the United States.

125 Cong. Rec. S17707 (daily ed. Dec. 4, 1979).

> In view of the increased uncertainty of the Iranian oil supply, as well as that of the entire Mideast, we must insure that we do not discourage production of domestic oil from known domestic resources.
>
> In particular, the Cook Inlet of Alaska has resources which will be prematurely abandoned unless corrective action is taken to modify present economic disincentives.

125 Cong. Rec. S18111 (daily ed. Dec. 10, 1979). See also 2 *Senate Hearings before the Committee on Finance on Crude Oil Tax,* 96th Cong., 1st Sess. at 217-253 (see especially comparative charts at 238-241).

The exemption of a portion of Alaskan oil production merely emphasizes the concern of Congress that imposition of the tax on certain Alaskan production would make it less likely that the state's resources would be developed fully. In fact this concern prompted a majority, if not all, of the Act's exemptions.

> The test for exemptions found in the bill to date is a very simple test and it has to do with production effects of the exemptions. That is to say, that over and over again it was argued in the Finance Committee and on the floor of the Senate that this exemption or that exemption is justified because it relates to national energy policy, that, if the Federal Government foregoes revenues by the exemption route on certain types of oil, those exemptions will be justified by production effect on types of oil that are thought to be sensitive to the taxation on its production.

125 Cong. Rec. S18651 (daily ed. Dec. 15, 1979). See also 125 Cong. Rec. S17399, S17422 (daily ed. Nov. 28, 1979); H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. at 103 (1980-3 Cum. Bull. 245, 263).

Congress devoted a great deal of effort and debate to devise a way to make certain that the contemplated excise tax would not act as a disincentive to oil production in Alaska and, thus, when considered in the context of all production, have a uniform force and effect on such production. It is of great significance that Congress rejected available alternatives to the method finally adopted to resolve the dilemma presented by the characteristics unique to the production of Alaskan oil, *i.e.*, partial exemption. Note that under the Act:

> All taxable oil is classified into one of several tiers. The structure of the tax is essentially the same for all tiers: the tax equals the tax rate times the taxable windfall profit, which equals the selling price of the oil minus an adjusted base price and minus a deduction for State severance taxes on the windfall profit. The tiers differ in the tax rate which is applied, in the adjusted base price which is used, and in some other respects.

H.R. Conf. Rep. No. 96-817, *supra* at 92 (1980 Cum. Bull. at 252). Code Sec. 4988(a), Appendix, *infra.* Obviously, a crucial factor in the computation of tax due is the "adjusted base price." The adjusted base price for a barrel of crude oil is the statutory base price as increased by inflation. Code Sec. 4989, Appendix, *infra;* Temporary Excise Tax Regulations Under the Crude Oil Windfall Profit Tax Act of 1980, Sec. 150.4989-1(a), Appendix, *infra.*

One possible solution Congress chose not to utilize was to assign the ultimately exempt Alaskan oil such a high base price that, as a practical matter, virtually no profit would be realized under of the Act and, therefore, no tax due on such oil.

> The committee made some progress in the treatment of Alaskan North Slope crude oil when it voted to increase the base price at which the tax would begin to apply. The committee rejected

> the better solution of exempting Arctic oil from the tax altogether and as a result of that decision as much as 3 billion barrels of reserves may remain in the ground because at the lower price they will be uneconomic.

125 Cong. Rec. S16327 (daily ed. Nov. 8, 1979). See also 125 Cong. Rec. S17479, S17480 (daily ed. Nov. 29, 1979), S17706, S17715 (daily ed. Dec. 4, 1979), S18111 (daily ed. Dec. 10, 1979), S18564 (daily ed. Dec. 14, 1979).

Another option was to allow a tax credit for qualified oil and development costs in Alaska. This alternative was offered by Senator Stevens on December 10, 1979, in the form of "Amendment No. 712 (Purpose: To create exploration, development, and production incentives by allowing a tax credit for windfall profit taxes expended on qualified oil and gas development costs in Alaska)" (125 Cong. Rec. S18125 (daily ed. Dec. 10, 1979)), and rejected on the same date (125 Cong. Rec. S18137 (daily ed. Dec. 10, 1979)).

Instead, in enacting the Alaskan exemption, Congress opted for a shorthand way of exempting oil produced in areas subject to severe climactic conditions, where the costs of production are high and where Congress desired to encourage production. In giving preference to the exemption approach rather than the credit or adjusted base price alternatives, Congress obviously was motivated by considerations of ease and cost of administration and reporting for all concerned as well as plain old common sense. This was acknowledged by Secretary of the Treasury Blumenthal when testifying on the Act. "It is easier to exempt Alaskan production from the tax than to require Alaskan producers to file tax returns solely for the purpose of showing that no liability has been incurred." *House Hearings, supra* at 19. Consequently, an inestimable amount of time-consuming, wasteful paperwork has been avoided by Congress' adoption of the location exemption.

To attack Congress' utilization of the location ex-

emption to achieve a resolution of complex problems and a balancing of regional interests as a violation of the Uniformity Clause is to place form over substance. The legislative history of the Act provides irrefutable evidence that Congress, after an exhaustive investigation into the relevant economic circumstances and potential impact of the tax on the nation from an economic and energy point of view, opted for, among others, a location exemption as the most equitable way of ensuring that the Act was imposed with "substantial uniformity within the meaning and purpose of the Constitution." *Head Money Cases, supra,* 112 U.S. at 595. Nor could it be suggested that the Act, particularly the Alaskan exemption, resulted from a coalition of a majority of states intent upon discriminating against another state or region. J. Story, *Commentaries on the Constitution of the United States, supra.* The latter point is emphasized by the fact that only the production of oil from certain areas of the state is exempt, and not all of the oil produced in the state.

Further, the quandary posed by oil production in Alaska, which is clearly distinguishable from other domestic production[6], is precisely the type of situation

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[6] Indeed it is evident that, in view of extreme climactic conditions, oil production in Alaska is so dissimilar from other domestic production that it amounts to a different article entirely in the context of the tax. Thus, there can be no comparison for purposes of the uniformity requirement, *e.g.*, the fact that oil subject to Arctic conditions is not found in Texas results in no greater lack of uniformity than does the absence of tobacco crops in many nothern states. *Head Money Cases, supra.* As said by the Supreme Court in *Florida v. Mellon,* 273 U.S. 12, (1927), rejecting an argument that the federal estate tax was unconstitutional because Florida imposed no state death tax which could be utilized for credit as did most other states:

> The criterion that the federal tax is not uniform because other states impose inheritance taxes while Florida does not is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse criteria to be found in the various states which necessarily work unlike results from the same tax. All that the Constitution Art. 1, Sec. 8, cl. 1, requires is

contemplated by the Supreme Court in *Regional Rail Reorganization Act Cases, supra,* 419 U.S. 102 (1974). The reasoning applied in that decision is equally applicable here. As was the Regional Rail Reorganization Act of 1973, the Act's Alaskan exemption is a carefully considered response to a specific problem of significant proportion. To effectuate its goal of preventing undue concentration of incredible sums of money in the hands of oil producers at the expense of the citizenry and, at the same time, offering an inducement to exploration and development of oil resources situated in outlying regions of severe climactic conditions, Congress was forced to implement some sort of distinction. As in the *Regional Rail Reorganization Act Cases,* the object of the legislation was, by necessity, a geographic one. Just as the problems with the railroads in the northeast were peculiar to that region, so is the problem with development of Alaskan oil peculiar to that region. Put simply, operating railroads in the northeast is not the same as in the rest of the country, and developing oil resources in Alaska is not the same as in the lower 48 states.

It cannot be legitimately contended that Congress is constitutionally prohibited from allowing a tax exemption based on the harsh and inhospitable conditions under which Alaskan oil is produced. The mere fact that Congress chose to frame that exemption in terms of the particular geographic area in which those conditions occur does not compel a contrary conclusion. Indeed, the fact that Congress did subject existing Alaskan oil production to the imposition of a windfall profits tax should

(Footnote 6 continued)

> that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States.

We do not understand either Louisiana or Texas to contend that some oil will also be produced in their states under frigid developmental conditions and, therefore, they have not shown that producers under their jurisdictions will be subject to discriminatory liabilities.

demonstrate without more that the tax was intended to be uniform in its application to all affected states.

To sum up, it is inconceivable that the framers of the Constitution intended it to operate in an inflexible, non-responsive manner, thus acting as a stranglehold on the power of Congress to deal effectively with the nation's increasingly complex, growing needs in an ever-changing world. Not even the brilliant individuals responsible for the Constitution could have foreseen the extent to which their infant nation would grow in size or industrialization and its concomitant dependence on oil, that a faraway arctic region to be known as Alaska would be a treasure trove of oil or that the production of oil in Alaska would be so extraordinarily difficult and expensive. It is just this type of situation that Alexander Hamilton must have had in mind when he acknowledged that, inasmuch as the needs and wants of a society could not be imagined, much less calculated, a Constitution should not set limits to a nation's resources if it is expected to survive. 2 Elliot's Debates 351 (2d ed.), *supra.* Clearly, a cardinal principle of judicial construction is that the Constitution was intended to be a flexible, sensitive instrument capable of adaptation. *Regional Rail Reorganization Act Cases, supra.*

Finally, the Constitution provides specific guarantees of rights and limits on Government power in a wide range of situations, principally to protect against the tyranny of a majority. The uniformity requirement is one such limit. The protection of rights and interests otherwise is conferred upon the political process. Where, as here, Congress does not impose a geographically non-uniform tax on a few states, but instead a blanket tax applicable everywhere, with the only colorably geographic distinction being a limited exemption operative in part of a relatively undeveloped non-contiguous single state, the political process protects the nation from potential injustice. The people's representatives making up the constitutionally required majorities of Congress have chosen here to make limited allowances for a remote geographic area due to uni-

que, extraordinary circumstances bearing on the production of oil in that area. The majority has not conspired to enrich itself at the expense of a few, but to assist a small part of the Union for the benefit of all. Thus, the policy underlying the uniformity requirement does not come into play in this case.

We respectfully submit that the foregoing demonstrates that the Act is substantially uniform "within the meaning and purpose of the Constitution", *Head Money Cases, supra* at 595, and, therefore, is constitutional.

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